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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

DOUGLAS AUSTIN HARBERT

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. An inventory search, in the absence of any police guidelines regulating the conduct of such a search, violates the Fourth and Fourteenth Amendments of the United States Constitution.

II. A trial court may not find independent grounds which were never advanced by the State to overrule a motion to suppress.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. An inventory search, in the absence of any police guidelines regulating the conduct of such a search, violates the Fourth and Fourteenth Amendments of the United States Constitution.

II. A trial court may not find independent grounds which were never advanced by the State to overrule a motion to suppress.

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 3

A. HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW 4

B. STATEMENT OF FACTS 6

THE REASONS FOR GRANTING THE WRIT 8

1. The court of appeals' reliance on **Florida v. Wells**, 110 S. Ct. 1632 (1990) is a misinterpretation of the law as announced by the United States Supreme Court concerning the validity of inventory searches

2. The trial court's finding of independent grounds which were never advanced by the State to overrule a motion to suppress violates the Fourth and Fourteenth Amendments of the United States Constitution

CONCLUSION 20

CERTIFICATE OF SERVICE 20

APPENDICES

Appendix A: Judgment Entry of the Motion to Suppress

Appendix B: Sentencing Journal Entry

Appendix C: Ohio Revised Code Sections

Appendix D: **State v. Harbert**, Stark County Court of Appeals

Appendix E: **State v. Harbert**, Ohio Supreme Court

Appendix F: Portions of Transcript of Motion to Suppress

TABLE OF AUTHORITIES

Cases	Page
Arkansas v. Sanders 442 U.S. 753	8, 17
Colorado v. Bertine 479 U.S. 367 (1987)	9, 10, 11, 13, 14, 16
Florida v. Wells (Apr. 18, 1990) U.S. Sup. Ct. Case No. 88-1835, 47 Crim. L. Rptr. (BNA)	5
Illinois v. Layfayette 462 U.S. 640 (1983)	18
New York v. Belton 453 U.S. 454 (1981)	18
People v. Fox 379 N.E. 2d 917 (Ill. App. 1978)	12
Smith v. Ohio 110 S. Ct. 1288 (1990)	9
South Dakota v. Opperman 428 U.S. 364 (1976)	8, 10, 11, 14, 17
State v. Caponi 12 Ohio St. 3, 302 (1984)	14
State v. Goodrich 256 N.W. 2d 506 (Minn. 1976)	12
State v. Hardman 567 P2d 238 (Wash. App. 1977)	12
State v. Hibbett 150 Ohio St. 3d, 376 (1980)	12
State v. Phifer 254 S.E. 2d 586 (N.C. 1979)	12
State v. Robinson 580 St. 2d 478 (1979)	8, 10, 14

State v. Slockbower
397 A2 1050 (N.J. 1979) 12

United States v. Jones
469 U.S. 478 18

United States v. Staller
616 F2d 1284 (6th Cir.) cert. den. 449
U.S. 869 (1980) 11

CONSTITUTIONAL PROVISIONS

Fourth Amendment 2

Fourteenth Amendment 2

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
Term, 19

Douglas Austin Harbert
Petitioner
v.
State of Ohio
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT OF OHIO

The petitioner, Douglas Harbert, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio entered in the above-styled proceeding on December 19, 1990.

OPINIONS BELOW

The Ohio Supreme Court denied jurisdiction, thereby letting stand the decision of the Fifth Appellate District, Stark County, Ohio. A copy of the Court's opinion appears in the appendix to the Petition as Appendix E.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on December 19, 1990, and this petition was timely filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. @ 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

STATEMENT OF THE CASE

Petitioner, Douglas Harbert, was initially charged on May 12, 1989, with Possession of Cocaine, in violation of Revised Code Section 2925.03(A)(6), a felony of the second degree; Permitting Drug Abuse in a Vehicle, in violation of Revised Code Section 2925.13(A), a misdemeanor of the first degree, and with Improperly Handling a Firearm in a Motor Vehicle, in violation of Revised Code Section 2923.13, a misdemeanor of the fourth degree. A copy of these Code Sections are attached to this petition and marked as Appendix C.

Petitioner was indicted on June 23, 1989, and filed a Motion to Suppress on August 1, 1989, contending that all evidence against petitioner was obtained as a result of an illegal search and seizure. A hearing was held upon the Motion on September 11, 1989, and Judge Gwin handed down his decision on September 29, 1989. The opinion of the Stark County Common Pleas Court is unreported but attached to this Petition as Appendix A.

Petitioner subsequently changed his plea from not guilty to no contest and preserved his right to appeal the denial of his motion to suppress. The court accepted the plea, found petitioner guilty, and on November 27, 1989 was sentenced to an indeterminate term of three (3) to fifteen (15) years for Aggravated Trafficking; to a determinate sentence of six (6) months for Permitting Drug Abuse in a Motor Vehicle; and to a determinate sentence of thirty (30) days for Improper Handling of a Firearm. These sentences are to be served consecutively. The Sentencing Journal Entry of the Stark County Common Pleas Court is attached to this Petition and market as Appendix B. Execution of sentence was suspended pending appeal.

Petitioner appealed the judgment to the Court of Appeals of Ohio for the Fifth Judicial District. He raised as error the trial court's overruling of his motion to suppress. The court of appeals found no error and affirmed petitioner's conviction. **State v. Harbert** (August 13, 1990), Stark County Court of Appeals, Fifth

Judicial District, No. CA-8027, unreported. This opinion is attached to this petition and marked as Appendix D. Following the decision of the Court of Appeals, petitioner's bond was revoked. Petitioner is currently incarcerated.

Petitioner filed a Notice of Appeal to the Ohio Supreme Court. On December 19, 1990, the court declined jurisdiction. **State v. Harbert** (December 19, 1990), Ohio Supreme Court, No. 90-1770, unreported. This opinion is attached to this Petition and marked as Appendix E.

A. How the Federal Issues Were Raised And Decided Below

Petitioner filed a Motion to Suppress in the Common Pleas Court of Stark County. Petitioner moved the court for an order suppressing any and all evidence obtained from him at the time of his arrest as said evidence was obtained as a result of an illegal search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

An evidentiary hearing was conducted on September 11, 1989. On September 29, 1989, the trial court overruled petitioner's motion to suppress. The trial court ruled that the search of Petitioner's car was made pursuant to a legitimate inventory search even though the court found that the "Ohio State Highway Patrol maintains a policy of giving officers discretion over whether to take possession of vehicles being operated by an impaired operator." The trial court also ruled that even if the search was conducted with an investigative purpose, it was still permissible as a "search incident to arrest." See Appendix A.

Petitioner filed a timely appeal, averring that the trial court erred by "failing to suppress the evidence seized under the guise of an inventory search when, in fact, it was seized during an investigative or evidentiary search." Petitioner additionally argued that the trial court erred when it found independent grounds which were never advanced by the State to overrule the motion to

suppress.

On August 13, 1990, the Court of Appeals for the Fifth Judicial District, affirmed the trial court's denial of the motion to suppress relying specifically on **Florida v. Wells**, 110 S. Ct. 1632 (1990), which was decided subsequent to the filing of Petitioner's brief with the court of appeals but prior to oral argument. The court of appeals relied on the State of Ohio's argument that "[a] police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." **Florida v. Wells, supra** at 1635.

On August 21, 1990, petitioner appealed to the Ohio Supreme Court, asserting that the case involved a substantial constitution question and presented a question of great public interest. Petitioner raised the following propositions of law in the Ohio Supreme Court:

I. Appellant was denied his constitutional rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution when the trial court failed to suppress the evidence seized under the guise of an "inventory search" when, in fact, it was seized during an investigative or evidentiary search.

II. Appellant was denied his Constitutional rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution when the trial court found independent grounds which were never advanced by the State to overrule the appellant's motion to suppress.

On December 19, 1990, the Ohio Supreme Court declined jurisdiction. **State v. Harbert** (December 19, 1990), Ohio Supreme Court, No. 90-1770, unreported. See Appendix E.

B. Statement of the Facts Material to the Consideration of the Questions Presented.

The below stated facts are taken from the transcript of the Hearing of the Motion to Suppress. Relevant sections of the transcribed are attached to this Petition and marked as Appendix F.

On May 12, 1989, the Petitioner was arrested outside his residence located at 2994 Brunnerdale Road, Jackson Township, Stark County, Ohio. Just prior to his arrest, approximately 1:30 a.m., the Petitioner was traveling south on Brunnerdale Road when he spotted Officer Diss traveling north on Brunnerdale Road. Officer Diss determined that the Petitioner was exceeding the lawfully posted speed limit. (R-24) While Officer Diss was turning around, the Petitioner turned left onto a private road and right into his driveway. (R-27) Officer Diss arrives as the Petitioner is exiting his car and parks behind and west of the Petitioner's car with his red lights on. (R-29) The Petitioner turns and approaches the officer and they meet between the two cars. (R-20,30) Officer Diss informs the Petitioner that he had been clocked doing 69 m.p.h. in a 55 m.p.h. area. (R-8) Officer Diss then detects the odor of alcohol and asks the Petitioner to have a seat in his patrol car. (R-9)

While the Petitioner is in the front seat, Officer Diss inquires if the address on his license is his current address and is informed by the Petitioner that he lives at 2994 Brunnerdale Road, where his car is parked. (R-30,31)

Officer Diss then detects the odor of burnt marijuana about him and has the Petitioner exit the vehicle and perform some field sobriety tests. (R-9) His performance was rated fair by Officer Diss and he was placed under arrest for Driving Under the Influence. (R-10) The Petitioner was then searched and a clear glass vial, with white powder residue, suspected to be cocaine, was found in one of his pockets. (R-11) The Petitioner was handcuffed and placed in the back of the cruiser and seat belted. (R-35)

Officer Diss then proceeds to approach Petitioner's car and look into it by means of a flashlight and opens the interior and starts to perform an inventory search. (R-35,38) Officer Diss does not remember if he found anything there or if it was later, (R-35) but he does remember returning to the Petitioner and getting his car keys from his pants pocket. (R-36) Then using the keys, he opens the locked trunk and the contraband and weapons are found.

Subsequently, backup officers are called and Officer Diss helps in the inventory of the contents of the car. (R-43). As a result of the various searches of the Petitioner's car, the Petitioner was charged with Possession of Cocaine, in violation of Revised Code Section 2925.03(A)(6); Permitting Drug Abuse, in a Motor Vehicle, in violation of Revised Code Section 2925.13(A) and with Improperly Handling a Firearm in a Motor Vehicle, in violation of Revised Code Section 2923.16.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' reliance on Florida v. Wells, 110 S. Ct. 1632 (1990) is a misinterpretation of the law as announced by the United States Supreme Court concerning the validity of inventory searches.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall be issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

It has long been a fundamental principle of Fourth Amendment analysis that exceptions to the warrant requirement are to be narrowly construed. **Arkansas v. Sanders**, 442 U.S. 753 (1979) and **South Dakota v. Opperman**, 428 U.S. 364 (1976). One of those exceptions is the "Inventory Search" as defined by the United States Supreme Court in **South Dakota v. Opperman, supra, Id.** and the Ohio Supreme Court in **State v. Robinson**, 58 O. St. 2d 478 (1979). This exception is bottomed on the fact that it is not investigative in nature but one of care taking and that three governmental interests are served. 1) The protection of the owner's property while it remains in police custody; 2) the protection of the police against claims or disputes over lost or stolen property; and 3) the protection of the police from potential danger. **South Dakota v. Opperman**, 42 U.S. at 369.

In **State v. Robinson, supra**, as well as **South Dakota v. Opperman**, the bright line rule seemed to be that if an inventory search were to be valid three components had to merge, 1) it was standard police

procedure; 2) the vehicle was legitimately impounded and; 3) there was an absence of investigating motive. Failure of the State to establish any one of those three requirements, renders so called "inventories" insufficient as a matter of law.

The United States Supreme Court in **Colorado v. Bertine**, 479 U.S. 367 (1987) changed the equation by requiring the State only to prove that reasonable police regulations relating to inventory procedures were in place and that they were administered in good faith so as to satisfy the requirements of the Fourth Amendment. It is the Petitioner's contention that this is just a restatement of the Opperman test, but whatever the test used in the instant case, this search does not satisfy the Fourth Amendment.

Ultimately, the Court of Appeals of Ohio relied on **Florida v. Wells**, 110 S. Ct. 1632 (1990) to affirm the denial of the Motion to Suppress. **Florida v. Wells, supra**, was decided subsequent to the filing of petitioner's brief in the Court of Appeals but prior to oral argument.

In the Court of Appeals, the prosecution relied upon a statement made by this Court that "[a] police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." **Florida v. Wells, supra** at 1635.

However, the Court of Appeals of Ohio failed to follow the ultimate holding of that case which upheld the suppression of the evidence because the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search. **Id.** Therefore, the search was not properly regulated to satisfy the Fourth Amendment. **Id.**

As in **Florida, supra**, the search in the instant case of Petitioner's automobile was not sufficiently regulated to satisfy the requirements of the Fourth Amendment.

In **Smith v. Ohio**, 110 S. Ct. 1288 (1990), this Court reversed the Ohio Supreme Court's decision after the filing of the Petition for Writ of Certiorari for failure to follow the law controlling search incident to arrest.

Petitioner would invite this Court to do the same in this case.

a. Standard Police Inventory

Inventory searches, to be valid, must be carried out in accordance with **standard procedures** in the department. **State v. Robinson, supra, South Dakota v. Opperman, supra** and **Colorado v. Bertine, supra**. The evidence offered by the State below failed to establish these standards. Officer Diss, when questioned by the State, stated:

Q: Okay. Is it routine after a DUI stop to have the vehicle, the person who is driving the vehicle's car towed.

A: It's up to the Officer.

Q: Had there been another passenger in the car, would you have had the car towed. Assuming that the person was not under the influence of alcohol.

A: Well, a lot of times, if it was a sober passenger that would just follow us right down to the Police Department or come pick up the person after a breath test if there's not gonna be incarceration . . .

Q: And is that [administrative inventory] routinely done after a car is towed whenever a car is towed or . . .

A: Yeah. We do an inventory

(R-13, 14)

When questioned further on Cross Examination, Officer Diss testified:

Q: Okay, now you, uh, are there any guidelines for the State Highway Patrol on administrative searches.

A: Uh, I'm not sure if there's any set forth in policy and procedure or not.

(R-18)

Later he testified:

Q: And to the best of your recollection, there is no policy or procedure for an administrative report search, is that correct?

A: Oh, it's set forth in policy and procedure. I do not know exactly what is set forth and what it states . . .

Q: Okay, and when's the last time that you read

them?

A: I really couldn't tell you . . .

Q: Four years ago?

A: Could be.

(R-19) Appendix F.

Then incredulously, Officer Diss testified that he had never seen "You are Commanded To Search" by Judge James Bachman (Defendant's Exhibit One and Two). If guidelines exist, the State has failed to show them or that Officer Diss is even vaguely familiar with them.

In **Colorado v. Bertine, supra** at 376, Justice Blackman, with whom Justice Powell and Justice O'Conner join, wrote a separate opinion to "underscore the importance of having such inventories conducted **only** (emphasis added) pursuant to standardized police procedures". In the instant case, no procedures were introduced except what Officer Diss could recall from reading something over four years ago.

Justice Blackman further stated that, "The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search." **Colorado v. Bertine, supra** at 377 citing **South Dakota v. Opperman**, 428 U.S. 364, 382-83. In the instant case, Officer Diss even searched the **hood** area of the car during his inventory search. (R-52)

In **South Dakota v. Opperman**, the Court stressed "no significant discretion is placed in the hands of the individual officer, he usually has no choice as to the subject of the search or its scope. **South Dakota v. Opperman, supra** at 384. Clearly, Officer Diss exercised almost unlimited discretion over the scope of the search since there were no guidelines to constrain him.

b. **Legitimate Impoundment of Vehicle**

Robinson, Opperman and **Bertine** require that the police have "lawful custody" of the vehicle in order to conduct an inventory of its contents. Most courts have

held that the impoundment be necessary in order for it to be lawful. See e.g. **U.S. v. Staller**, 616 F2d 1284 (5th Cir.) cert. den. 449 U.S. 869 (1980); **State v. Goodrich**, 256 N.W. 2d 506 (Minn. 1976); **State v. Slockbower**, 397 A2 1050 (N.J. 1979); **State v. Phifer**, 254 S.E. 2 586 (N.C. 1979). Several courts also require that the police must first explore less intrusive means of dealing with the vehicle before impounding it. **State v. Slockbower, supra; People v. Fox**, 379 N.E. 2d 917 (Ill. App. 1978); **State v. Hardman**, 567 P2 238 (Wash. App. 1977).

The Ohio courts have adopted that line of reasoning which requires that the police look to other less intrusive means than impoundment. In citing **Opperman** with approval, the Hamilton County Court of Appeals stressed that the evidence failed to demonstrate the unavailability or inability of the owner to protect his own property in the automobile. **State v. Hibbett**, 150 Ohio St. 3d, 376 (1980).

In the case at bar, Officer Diss was aware that the car was legally parked in a driveway and that the Petitioner had informed him that he did, in fact, live there. (R-30,31).

There was testimony that the Petitioner locked his car when he exited the vehicle. (R-36,37,67) At the time of his arrest, there was no need to impound his car since it was legally parked and off the road.

Although Officer Diss cannot state what the policy and procedures dictate or what the guidelines are, he did know that he had discretion under those guidelines. He stated:

Q: Do you administratively search all DUI stops?

A: No, I do not.

Q: Okay, and do you make some decision on whether or not to tow or whether or not to search, is that correct?

A: I think that there has been decision of whether to tow the vehicle and search the vehicle or whether or not to tow the vehicle and not to search it.

Q: That's correct. And you made those decisions based on some criteria?

A: Based on that's the officer's discretion, **whether**

I want to or whether I don't.

Q: Okay. What I want to know is what goes into that decision making process? What determination is it when you search one car and not another? What do you use as a criteria?

A: **I really have no set standards, nothing that I go by. It's a decision I make at the time.** (R-22,23) (emphasis added) Appendix F.

As stated by Justice Powell in **Bertine, supra**, "This absence of discretion ensures that inventory searches will not be used as a purposeful and general means to discover evidence of crime." **Colorado v. Bertine, supra** at 376. The Supreme Court is aware that some discretion is contemplated but only "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity, **Colorado v. Bertine, supra** 375.

The trial court in the instant case found the Ohio State highway Patrol maintains a policy of giving officers discretion over whether to take possession of vehicles being operated by an impaired operator. He then listed the factors used: 1) the vehicle presents a threat to travel, 2) whether it is on property clearly owned by the person involved, 3) where the vehicle itself could be vandalized. The court then ruled that the trooper "could legitimately believe that Harbert chose to pull into the location as the result of the pursuit of the patrol car." Appendix A.

Assuming arguendo that there exists a regulation which requires the car to be parked on property "clearly" owned by the person involved, it was not shown that Officer Diss did not believe that the Petitioner lived at the residence nor that he pulled into said driveway as a result of the pursuit of the patrol car. Nevertheless, this type of discretion clearly is not that which would be tolerated as an exception to the Fourth Amendment's requirements for a warrant.

c. **Absence of Investigatory Motive**

The Supreme Court of Ohio has fairly warned the

police of the Constitutional prohibitions against pretextual searches where inventories are involved.

> ". . .a routine inventory search of a lawfully impounded automobile is not unreasonable within the meaning of the Fourth Amendment when performed pursuant to standard police practices and when the evidence does not demonstrate that the procedure involved is merely a pretext for an evidentiary search of the impounded automobile. It appears logical to conclude from this that a pretextual search is not an inventory search. **State v. Robinson, supra** (emphasis added).

Inventory searches are thus permissible **only** when not utilized in reality as an evidentiary search. It is the **non-investigative** police inventory of automobiles to which warrant requirements are inapplicable. See, **South Dakota v. Opperman, supra** at Fn5. The Supreme Court in **Colorado v. Bertine, supra** was concerned that inventory searches could be pretexts for evidentiary searches.

> ". . .ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime". **Colorado v. Bertine, supra** at 376.

The Ohio Supreme Court in **State v. Caponi**, 12 Ohio St. 3, 302, stated:

> "A search which is conducted with an investigatory intent, and which is not conducted in the manner of an inventory search, does not constitute an "inventory search", and may not be used as a pretext to conduct a warrantless evidentiary search."

In the instant case, we must examine the "inventory search" to ascertain whether Officer Diss was conducting an evidentiary search rather than the inventory search he claims. First, at no time did Officer Diss on his first entry

into the automobile, write anything down even though he noticed: a) a cellular phone; b) dash mount radar detector, and c) scanner.

Q: And you're in there to write down what you find and what you see, right, so that you've got some record?

A: That's true.

Q: And you're not writing it down?

A: Not at that time, I was not, no.

(R-38) Appendix F.

Second, at no time was an inventory given to the Defendant nor was any written instrument from said inventory search ever introduced by the State.

Q: Did he ever give you a copy of a piece of paper at any time about the contents . . .

A: No.

Q: Let me finish the question. Did he or anybody else give you a list of the contents of your car.

A: No, they never did.

(R-61) Appendix F.

Third, prior to inventorying the car, Officer Diss inquired of the Petitioner on two different occasions whether he had any contraband in the vehicle or trunk.

Q: Do you remember asking Mr. Harbert prior to searching the car whether or not he had anything on him or in the vehicle or in the trunk, any contraband or anything that he should not have had?

A: I believe that's what I had asked him.

Q: Okay. And his answer was?

A: It would be no.

Q: But you asked him that, whether or not he had any drugs in the trunk prior to going into the car? He said, no?

A: Even when I was patting him down, I asked him if he had anything he shouldn't have.

(R-48,49) Appendix F.

Fourth, the first intrusion into the car by Officer Diss did not reveal any contraband and he went back and retrieved the keys from the Defendant/Petitioner and made the second intrusion into the car, i.e., the locked

truck where the contraband was found in a closed briefcase.

Q: And the you go up and the first time that you search into the car and look around, you don't find anything right away, right?

A: I'm not sure if I found something right then or of it was later.

(R-35) Appendix F.

Fifth, the third intrusion into the car was when the other officers arrive later and help complete the "inventory search" which included the interior of the car, the trunk and under **the hood of the car.**

Q: So, other officers were now doing the search and you were outside in front of the car?

A: Right, I was searching the hood area of the car.

Q: The hood area of the car for inventory?

A: **Well, people put things underneath the hood too at times.** (emphasis added) (R-52) Appendix F.

Clearly, taking into consideration the totality of the circumstances, Officer Diss was more interested in what he could find than securing the automobile. It is the Petitioner's contention that Officer Diss used this as a pretext to search this automobile under the guise of an inventory search.

In is clear from all the facts that the state did not show "that reasonable police regulations relating to inventory procedures" existed nor that they were "administered in good faith" so as to satisfy the requirements of a warrantless search under the Fourth Amendment. **Colorado v. Bertine, supra**

Therefore, this Court should overturn the Ohio Supreme Court's decision and suppress the evidence in the instant case.

2. The trial court's finding of independent grounds which were never advanced by the State to overrule a motion to suppress violates the Fourth and Fourteenth Amendments of the United States Constitution.

In the instant case, a hearing was held on the Petitioner's Motion to Suppress on September 11, 1989. On September 20, 1989, the Court overruled the Petitioner's Motion finding that it was a valid inventory search but if it wasn't then, it was permissible since it was bottomed on an even better exception to the Fourth Amendments requirements for a warrant to search. The Court found that these facts simply rearranged, gave rise to a "search incident to arrest" exception to the Fourth Amendment's requirement for a warrant. Appendix A.

First, since the day of his arrest on May 12, 1989, through the preliminary hearing on May 19, 1989, and culminating in the hearing on the Motion to Suppress on September 1,, 1989, no one from the State, including Trooper Diss, at any time, even mentioned that this search was being conducted as a search incident to a lawful arrest.

One of Petitioner's Counsel's very first questions at the Suppression hearing was directed at this very issue.

Q: Did Mr. Harbert give you permission to search the car. Yes or no.

A: No. No he did not . . .

Q: And do you remember me asking you the question that you didn't search incident to arrest, but you searched the car pursuant to an inventory search, is that correct ...

Q: And, did you search the car pursuant to an inventory search?

A: I had searched the car for an administrative inventory, that's correct.

(R-17,18) Appendix F.

The first time the Petitioner hear that this search was being legitimized by the phrase "search incident to an arrest" was when he read it in Judge Gwin's ruling sometime after September 20, 1989.

It has long been a fundamental principal of the Fourth Amendment analysis that exceptions to the Warrant Requirements are to be narrowly construed. **Arkansas v. Sanders, supra South Dakota v. Opperman, supra**. It seems axiomatic that if the State

didn't argue an exception nor offer any proof of the exception that to rely on it would be unconstitutionally impermissible. In the instant case, at no time during the hearing were the words "probable cause" every used by Officer Diss or anyone by the State. One can only surmise if he had "probable cause" he would have articulated what he predicated it on since he didn't, it would be safe to assume Officer Diss **didn't** feel probable cause existed at the time. (Saying his testimony as the sequence of events is confusing is an understatement).

Judge Gwin cites **New York v. Belton**, 453 U.S. 454 (1981) for the proposition that "an officer **may** search the complete passenger area of a car at the time of an arrest irregardless of whether the area was within reach of the Defendant." The operative word being **may** and in this case, Officer Diss felt or decided he could accomplish his goals with an inventory search.

Nevertheless, he searches the passenger compartment and Judge Gwin states that the trooper was confronted with the smell of marijuana and the discovery of marijuana in the passenger compartment of the vehicle." (After rereading the transcript, it is not possible to tell when he found the marijuana but Petitioner contends it was after going into the trunk). Thus, Judge Gwin concludes that Trooper Diss "now had probable cause to believe that contraband was present" and the **United States v. Jones**, 469 U.S. 478 gave him the right to search the entire vehicle. Appendix A.

Although Judge Gwin cited the language in **Illinois v. Lafayette**, 462 U.S. 640 (1983) for another point it can be used here.

> "The real question is not what could have been achieved, but whether the Fourth Amendment requires such steps . . . The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative, less intrusive means." 479 U.S. at 374. (emphasis in the original)

In the instant case, "what could have been achieved"

under the search incident to an arrest coupled with further "probable cause" concepts versus what the Fourth Amendment requires if one conducts a less intrusive inventory search. It is the Petitioner's contention that once the inventory search is found to be constitutionally defective, then it cannot be buttressed by another exception. Especially since the search incident to an arrest was never argued below. (Clearly, the issue of whether the initial arrest would have taken on paramount importance but since it wasn't an issue it wasn't contested).

Therefore, Petitioner contends the search was unconstitutional and the evidence should have been suppressed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. Should the Court decide that plenary review is unnecessary in view of the clear conflict between the judgment of the Ohio Supreme Court and this Court's prior decisions, petitioner alternatively requests that the Court summarily reverse the judgment of the Ohio Supreme Court.

Respectfully submitted,

SMITH, HANNA, ALTWIES,
ADGATE & EDMINISTER

J. THOMAS HENRETTA
Counsel of Record
One Cascade Plaza/Suite #1450
Akron, Ohio 44308
(216) 376-9121

CERTIFICATE OF SERVICE

Pursuant to Rule 29.3, Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on Respondent, State of Ohio, by forwarding a copy to the office of its counsel, Lee Fisher, Attorney General, State Office Tower, 30 E. Broad Street, Columbus, Ohio 43266-0410, by U.S. mail this ____ day of March, 1991. I further certify that all parties required to be served have been served.

J. THOMAS HENRETTA
Counsel of Record

APPENDIX A

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 89-9330
Plaintiff	:	Judge James S. Gwin
vs.	:	ORDER
DOUGLAS A. HARBERT,	:	
Defendant.	:	

This matter is before the Court upon the Motion to Suppress ("Motion") which was filed August 1, 1989 by Defendant, Douglas Austin Harbert ("Defendant" or "Harbert".) The Motion seeks to suppress "any and all evidence which was obtained from the Defendant at the time of his arrest on May 12, 1989", arguing that such evidence was obtained as the result of a warrantless and illegal search.[1] A hearing was held upon the Motion of September 11, 1989. For the reasons hereinafter set out, the Motion will be denied.

On May 12, 1989, Ohio State Highway Patrolman Todd Diss ("Diss") was on patrol in Jackson Township, Stark County, Ohio. At approximately 1:30 am he was travelling north on Brunnerdale Road when he had occasion to determine that a vehicle travelling south on Brunnerdale Road was exceeding the lawfully posted speed limit. The vehicle was determined, by radar, to be travelling at a speed of sixty-nine (69) miles per hour in a fifty-five (55) miles per hour speed limit area. After reversing travel, Diss pursued the vehicle and followed it

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[1]Defendant has made no assertion that the original arrest of the Defendant for driving under the influence was without probable cause. The facts, as found by the Court in this matter, would not support such a claim.

to a private road and then into the driveway of a home located at 2994 Brunnerdale Road, Jackson Township, Stark County, Ohio.[2] Upon approaching the vehicle after leaving the cruiser, Diss found the Defendant to have exited his vehicle and found him to be approaching the cruiser. Trooper Diss then indicated to Harbert that he had been speeding. He then inquired of Harbert as to whether Harbert had been consuming alcohol and as to where he had been. Harbert indicated that he had been at the "Pub Club" after having left a bowling banquet and had consumed a couple of drinks.

Diss testified credibly that he had also detected the odor of marijuana about the Defendant and had made inquiry of the Defendant concerning this odor. The Court credits Diss' testimony that Harbert indicated that he had been in the presence of marijuana smoking although claiming not to have consumed such substance himself.

Diss thereafter administered a field sobriety test to Harbert and determined to place Harbert under arrest for driving while under the influence. Diss thereafter searched the Defendant in the area in front of the patrol car. Prior to instituting the search, Diss asked the Defendant whether he had any substances upon him which he should not have. The Defendant responded that he did not. The search produced a clear glass vial in one of the Defendants pockets with a white residue. This residue and the vial were consistent with it being cocaine. No other contraband was found upon the person of the Defendant.

The Defendant was then handcuffed and placed in the cruiser. A review of his operators license and vehicle registration both indicated that the Defendant lived at another address from that in which the vehicle was then parked. Trooper Diss determined to impound the vehicle

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[2]There was some confusion as to the exact address of the house. Trooper Diss initially recorded the address as being 3014 Brunnerdale Road. The correct address of the location appears to have been 2994 Brunnerdale.

and have it towed. Harbert argues that such an impoundment was unnecessary given his expression to the trooper that he lived at the location. There was, at least initially, no evidence available to Diss which supported this. No persons in the house came forward to identify the Defendant as an occupant of the house or even turned on any lights.

The Ohio State Highway Patrol maintains a policy of giving officers discretion over whether to take possession of vehicles being operated by an impaired operator. Diss testified that factors utilized in making this decision include whether the vehicle presents a threat to travel, and whether it is on property clearly owned by the person involved. Ultimately, the officer is given discretion to impound the vehicle where it is a danger to other traffic or where the vehicle itself could be vandalized. The trooper could legitimately believe that Harbert chose to pull into the location as the result of the pursuit of the patrol car.

Diss began conducting an inventory of the vehicle after determining to impound the vehicle. Diss obtained the keys for the vehicle from the pocket of the Defendant who was handcuffed in the vehicle.[3] The Court finds that Diss neither asked for, nor received, permission to obtain the keys or to search the vehicle. Diss indicated that he found a police scanner and a radar in the passenger compartment. In addition he found a hand rolled cigarette which was thought to be marijuana below the armrest as well as a partially smoked hand rolled cigarette also thought to be marijuana in the ask tray. Thereafter, Diss conducted an inventory search of the trunk. He there

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[3]The Defendant testified that the keys for the vehicle were required to gain access to the vehicle itself as well as the trunk. Diss testified that the keys were needed for gaining access to the trunk although he was not sure whether they were needed to gain access to the passenger compartment.

found a large amount of cocaine[4], more marijuana, certain capsules, a large amount of money and with a loaded handgun.

While conducting this search, Diss was joined by Highway Patrol Sergeant Estris and Troopers Eaton and Hetrick. Diss testified that, at various times, these officers assisted him in conducting the search. While so assisting Diss in this search one of the officers attempted to actuate a radio garage door opener found in the passenger area of the vehicle. Diss testified credibly that this attempt occurred after the search had been initiated.[5]

Thereafter the Defendant was indicted for possession of cocaine, a schedule II substance in an amount exceeding three times the bulk amount and after having previously been convicted of a felony drug abuse offense (R.C.2925.03(A)(6)), permitting drug abuse in a vehicle (R.C.2925.13(A)) and with improperly handling a firearm in a motor vehicle (R.C.2923.16).

The Court finds that the search of the Defendant's automobile was proper upon the independent and independently sufficient grounds that an inventory was being made of a impounded property and that the patrolmen had probable cause to believe that the automobile searched contained contraband.

After viewing the demeanor of the witnesses and closely reviewing the testimony, the Court finds that the search of the subject vehicle was legitimately motivated by a desire to secure the property in the vehicle and to protect the officer and the Defendant from any potential claims that could arise with regard to personal property

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[4]The Defendant is charged, among other crimes, with possession of cocaine in an amount in excess of three times the bulk amount.

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[5]The Defendant testified that it was Diss, not another officer who used the garage door opener. The Court does not find this testimony credible.

in the vehicle. The Court finds that the search was notconducted in bad faith or for the sole purpose of investigation. As such, the search was wholly protected, **Colorado v. Bertine**, 479 U.S. 367 (1987), **Michigan v. Thomas**, 458 U.S. 259 (1982), **South Dakota v. Opperman**, 428 U.S. 364, 373 (1976), **Cooper v. California**, 386 U.S. 58 (1967).

Thus in **Bertine** the police officer had arrested a man for drunk driving and had determined to impound the van the man was driving. While conducting an inventory, the officer opened a closed backpack in the back of the van. The officer there discovered cocaine, other drugs and cash. The Supreme Court rejected the argument that the inventory was unreasonable because of the availability of other methods of protecting the contents of the vehicle. Citing **Illinois v. Lafayette**, 462 U.S. 640 (1983) the Court held:

> "The real question is not what 'could have been achieved,' but whether the Fourth Amendment **requires** such steps .... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive means.' " 479 U.S. at 374 (emphasis in the original)

Inventory searches serve a legitimate governmental interest in protecting the owners' property and to insure against claims of lost, stolen, or vandalized property and to guard police from danger. These concerns have been found to provide justification for inventory searches, **South Dakota v. Opperman**, 428 U.S. 364, 369 (1976). In **Opperman**, the defendants automobile was subjected to a search after being taken into custody for multiple parking violations. The Court held:

> "The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable."

As pointed out above, the presence of alternative methods

of securing the property do not render the inventory search unreasonable. As the Supreme Court held in Bertine:

> We conclude that here, as in Lafayette, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure." 479 U.S. at 374

The Court finds that the impoundment and inventory of the Defendant's automobile were done in good faith and pursuant to validly prescribed procedures. The fact that patrolmen are given some discretion over whether to impound and conduct an inventory does not render the search any less permissible, **Bertine** supra at 479 U.S. at 375.

Even if the search had been conducted with the purpose of investigation, which the Court has not found, it remains constitutionally permissible. The Court finds that the search of Defendant's automobile complied with constitutional requirements for the independent and wholly sufficient reason that there was probable cause for conducting such a search. As recounted above, Trooper Diss placed Defendant under arrest after the Defendant failed to satisfactorily complete the field sobriety test. This arrest was further supported by the Defendant's representation to the trooper that he had consumed some alcoholic beverages. After placing Defendant into custody, Diss was authorized to conduct a search of the complete person of the defendant together with materials within proximity to the Defendant. The Supreme Court held in **Chimel v. California**, 395 U.S. 752, 762-63 (1969):

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might

well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."

In **New York v. Belton**, 453 U.S. 454 (1981) the Court further clarified this holding. The Court in **Belton** found that an officer may search the complete passenger area of a car at the time of an arrest irregardless of whether the area was within reach of the Defendant. In **Belton** the Court found that a search of a closed pocket of a defendant's jacket was permissible even though the defendant had been placed under arrest, away from the jacket and did not have access to the jacket.

Upon conducting this lawful search, the trooper discovered a glass vial with a white powder residue. Such a finding was wholly consistent with illegal cocaine use. Moreover, the trooper was further confronted with the smell of marijuana and the discovery of marijuana in the passenger compartment of the vehicle. The officer thereafter had probable cause to believe that contraband was present in the automobile. In **United States v. Johns**, 469 U.S. 478 (1985) the Court found that the arresting officers had probable cause to conduct a search after detecting the smell of marijuana:

> "After the officers came closer and detected the distinct odor of marijuana, they had probable cause to believe that the vehicles contained contraband." 468 U.S. at 482

Once the officers had probable cause to believe that contraband was present they were permitted to search the entire vehicle. As state by the Supreme Court in **Michigan v. Long**, 463 U.S. 1032, 1035 n 1 (1983):

> "It is clear, and the respondent concedes, that if the officer had arrested Long, for speeding or for driving while intoxicated, they could have searched the passenger compartment under **New**

York v. Belton, 453 U.S. 454 (1981), and the trunk under **United States v. Ross,** 456 U.S. 798 (1982) if they had probable cause to believe that the truck contained contraband."

The law has long been established that a law enforcement officer can conduct a search of a motor vehicle without a search warrant where probable cause exists to believe that the vehicle contains contraband. Thus in **Carroll v. United States**, 267 U.S. 132 (1925) the Court held that a search, including the tearing apart of an automobile seat, without warrant was constitutionally permissible where the officers had probable cause to believe that the vehicle contained contraband. In **United Sates v. Ross**, 456 U.S. 798 (1982) the Court amplified upon the **Carroll** decision and held that such a warrantless search of a vehicle could include a search of all the vehicle, including the trunk:

> "These interests must yield to the authority of a search, however, which- in light of Carroll- does not itself require the prior approval of a magistrate. The scope of a warrantless search based on probable cause is no narrower- and no broader- than the scope of a search authorized by a warrant supported by probable cause." 456 U.S. at 823

Upon having probable cause to believe that the automobile contained contraband, the troopers were not required to obtain a warrant even after the vehicle had been impounded, **Chambers v. Maroney**, 399 U.S. 42 (1972), **Texas v. White**, 423 U.S. 67 (1975).

Finally, the search could include the trunk area of the vehicle as there was probable cause to believe that the trunk contained contraband. In **United States v. Johns**, 469 U.S. 478 (1985) the Supreme Court permitted search of certain packages which smelled of marijuana. It also found that the more complete search of the rest of the vehicle was valid:

> "The officers, however, were unaware of the

> packages until they approached the trucks, and the contraband might well have been hidden elsewhere in the vehicles. We agree with the Court of Appeals, see 707 F2d, at 1097, that the Customs officers had probable cause to believe that not only the packages but also the vehicles themselves contained contraband." 469 U.S. at 482.

The trooper had probable cause to believe that contraband was present in the vehicle and to conduct a search. The search permissibly included the trunk.

The Court thus finds that the search of the vehicle was permissible inventory search. The Court further finds that even if the intent of the search was investigatory, which the Court has found it was not, that the officer had probable cause in any case to believe that contraband was present. Irrespective of the inventory search, the troopers could constitutionally search the vehicle, including the trunk. For the foregoing reasons the Motion is hereby denied.

IT IS SO ORDERED.

Judge James S. Gwin

cc. Robert Horowitz
James B. Lindsey
Lawrence R. Smith

APPENDIX B

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, CASE NO. 89-9330

Plaintiff, JUDGMENT ENTRY

vs.

DOUGLAS A. HARBERT,

Defendant.

This day, August 16, 1990, this cause came on for hearing before the Court on motion by the State of Ohio to impose the sentence previously pronounced by the court pursuant to the August 13, 1990, ruling of the Fifth District Court of Appeals.

The Court, being fully advised in the premises, finds said motion well taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Sheriff of Stark County, Ohio, shall transport the defendant to the Chillicothe Correctional Institute in Chillicothe, Ohio, so that he may begin serving a sentence of an indeterminate term of not less than three (3) nor more than fifteen (15) years, or until otherwise pardoned, paroled or released according to law, on Aggravated Trafficking, 1 Ct. (R.C. 2925.03A6), and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be committed to the Chillicothe Correctional Institution in Chillicothe, Ohio, for a determinate term of six (6) months, or until otherwise pardoned, paroled, or released according to law on Permitting Drug Abuse in Motor Vehicle, 1 Ct. (R.C. 2925.13A), and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be committed to the Chillicothe Correctional Institution in Chillicothe, Ohio, for a determinate term of thirty (30) days, or until

otherwise pardoned, paroled, or released according to law on Improper Handling of a Firearm, 1 Ct. (R.C. 2923.13), and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant serve these sentences consecutively, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall pay a fine in the amount of $5000.00 on Count One of the Indictment, monies to be divided between the arresting agency and the law enforcement agency involved, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant serve an actual incarceration of three (3) years, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant receive credit for time served, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the automobile used in the commission of the crime be forfeited to the Ohio State Highway Patrol, to-wit: 1988 Ford Thunderbird, VIN 1FABP60F2JH242745, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant shall pay the costs of this prosecution for which execution is hereby awarded.

_____ Judge

APPROVED BY:

ROBERT D. HOROWITZ
STARK COUNTY PROSECUTOR

RICHARD A. NICODEMO
ASSISTANT PROSECUTING ATTORNEY

APPENDIX C

§ 2925.03 Trafficking in drugs.

(A) No person shall knowingly do any of the following:

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I with the exception of marijuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

§ 2925.13 [Permitting drug abuse.]

(A) No person, being the owner, operator, or person in charge of a locomotive, watercraft, aircraft, or other vehicles as defined in division (A) of section 4501.01 of the Revised Code, shall knowingly permit such vehicle to be used for commission of a felony drug abuse offense.

(C) Whoever violates this section is guilty of permitting drug abuse, a misdemeanor of the first degree, and if the offender has previously been convicted of a drug abuse offense, permitting drug abuse is a felony of the fourth degree.

§ 2923.16 Improperly handling firearms in a motor vehicle.

(C) No person shall knowingly transport or have a firearm in a motor vehicle, unless it is unloaded, and is carried in one of the following ways:

(1) In a closed package, box, or case;

(2) In a compartment which can be reached only by leaving the vehicle;

(3) In plain sight and secured in a rack or holder

made for the purpose;

(4) In plain sight with the action open or the weapon stripped, or, if the firearm is of a type on which the action will not stay open or which cannot easily be stripped, in plain sight.

(F) Whoever violates this section is guilty of improperly handling firearms in a motor vehicle. Violation of division (A) or (B) of this section is a misdemeanor of the first degree. Violation of division (C) of this section is a misdemeanor of the fourth degree.

APPENDIX D

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Norman J. Putman, P.J.
Plaintiff-Appellee	:	Hon. John R. Milligan, J.
	:	Hon. John R. Hoffman, J.
-vs-	:	
	:	
DOUGLAS A. HARBERT	:	Case No. CA-8027
	:	
Defendant-Appellant	:	
	:	
	:	OPINION

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. 89-93309

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee:

ROBERT D. HOROWITZ
PROSECUTING ATTORNEY
STARK COUNTY, OHIO

RONALD MARK CALDWELL
Trial & Appellate Counsel
Criminal Division
P.O. Box 20049
Canton, OH 44701

For Defendant-Appellant:

LAWRENCE R. SMITH
ONE CASCADE PLAZA
SUITE #1450
Akron, OH 44308

PUTMAN, P.J.

There are no assignments of error listed in the table of contents in this brief, but we distill from the arguments that two claims are made.

The first claim is that the trial court erred in overruling a motion to suppress the fruits of a so-called "inventory search." The second is that the court erred in finding "independent grounds" advanced by the State to overrule the suppression motion.

We overrule both assigned errors and affirm the judgment of the Court of Common Pleas.

On careful examination of the record, we find the judgment appealed from is entitled to affirmance upon the authority of the case of the **City of Xenia v. Wallace** (1988), 37 Ohio St.3d 216, 218, and also United Supreme Court case of **Florida v. Wells** (April 18, 1990), U.S. Sup. Ct. Case No. 88-1835, 47 Crim. L. Rptr. (BNA) 2021, 2021-2022. Upon careful consideration of the record, we find the search to be both reasonable and authorized by law.

For the forgoing reasons, both assigned errors are overruled, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed and this cause is granted to that court for execution of sentence.

Milligan, J. and
Hoffman, J. concur.

IN THE COURT OF APPEALS

FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
	:	
DOUGLAS A. HARBERT	:	
	:	
Defendant-Appellant	:	CASE NO. Ca-8027

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed, and this cause is remanded to that Court for further execution of sentence.

APPENDIX E

1990 TERM

To wit: December 19, 1990

State of Ohio, Appellee,	:	Case No. 90-1770
v.	:	E N T R Y
Douglas Austin Harbert, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Stark County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Lawrence R. Smith.

(Court of Appeals No. CA8027)

THOMAS J. MOYER
Chief Justice

A. Yes, sir, he did.
Q. Okay. And where did you pull in in relation to that driveway?
A. My patrol car was positioned right behind him.
Q. And are you familiar with the address of the drive that the Defendant pulled into?
A. I believe that the house numbers were 3014, and that was on Brunnerdale.
Q. Okay, and that was a residence. That was a single family home in otherwords?
A. Yes, it was.
Q. And was the Defendant by himself?
A. Yes, he was.
Q. And what happened after you made, after you approached him?
A. Uh, he exited his vehicle and faced the patrol car and I exited the patrol car and confronted him and advised him of the reason why he was stopped.
Q. And what did you tell him?
A. That he was clocked speeding on Brunnerdale Avenue.
Q. And what was the speed that you had clocked him at?
A. 69 and I locked him in at 68 and that was a 55 m.p.h. zone.
Q. And that's using your radar?
A. Right.
Q. And, okay. What happened after that?
A. While he was talking to me, a short conversation, I detected an odor of alcohol and asked him to have a seat in the patrol car and....
Q. Okay. Go on.
A. And that's where I continued talking to him and writing up a ticket, a citation for speeding.
Q. Okay. And you said that he had an odor of alcohol. Did you have any other reason to believe that he had been drinking, were there any other

independent facts that he had been drinking?

A. Uh, he had stated that he had come from the Pub Club where he had had a couple of drinks.

Q. Did you conduct at any point a field sobriety test?

A. Uh, before we did that I had also detected an odor of burnt Marijuana about him. I had asked him if he had been smoking Marijuana and he had stated that he had been in the company of some friends that had been smoking it. And when we exited the patrol car I showed him some field sobriety tests that I wanted him to do.

Q. And did you have him do those?

A. Yes, I did.

Q. And was he able to successfully complete the sobriety tests that you gave to him?

A. It was fair.

Q. And at any point in time was the Defendant placed under arrest?

A. Yes, he was.

Q. And when was that?

A. Uh, after I had determined that he was impaired.

Q. And when did you determine that he was impaired?

A. It was after the gaze and the stagness and the field sobriety test outside the patrol car.

Q. Did you handcuff him?

A. He was handcuffed.

Q. And did you search him incident to that arrest?

A. Yes.

Q. And as a result of that search, well, let's go back a moment. Where did you search him at?

A. Excuse me.

Q. Where was the search conducted at?

A. Right in front of the patrol car.

Q. And the patrol car was right in back of the vehicle that he had been driving?

A. Right kinda on an angle positioned behind him.

Q. And did you find anything when you searched him?

A. Yes, sir, I did.

Q. And what did you find?
A. I had found a clear glass vial, a small one with a white powder residue on the insides suspected to be Cocaine.
Q. And where did you find that?
A. It was in one of his pockets.
Q. And other than that did you find any other contraband on him that you believed to be contraband?
A. No, I didn't.
Q. And were you at that time or at any time aware of the home or the residence that the Defendant's car had pulled into?
A. I didn't know who lived there or in fact that he did live there.
Q. And did he indicate to you that he had lived there?
A. He had stated that he had lived there.
Q. Okay. Did anybody from that residence come outside, anybody else?
A. No.
Q. And did the Defendant approach, at any time approach the residence as if to go inside or anything prior to your talking to him?
A. No, they didn't.
Q. If there had been another passenger in the car, would that have changed...

MR. SMITH: Objection, Your Honor.
THE COURT: What grounds?
MR. SMITH: Your Honor, it's speculation, as to another passenger.
THE COURT: Overruled.

Q. Had there been another passenger in the car would you have had the car towed. Assuming that that person was not under the influence of alcohol?
A. Well, a lot of times, if it was a sober passenger they would just follow us right down to the Police Department or come pick the person up after a breath test if there's not gonna be incarceration.

Q. What happened after you called to be towed?
A. I believe, uh, I had went to the car and started an administrative inventory.
Q. And why do you do that?
A. Well, it's to protect person's property that belongs in the car and kinda protects ourselves of anything being stolen. We have a list of what we found in the car.
Q. And is that routinely done after a car is towed whenever a car is towed or...
A. Yeah, we do an inventory.
Q. And did you find anything as a result of that search?
A. Right, I did.
Q. What?
A. I found some suspected Marijuana which was tested positive. Uh, I found...
Q. And where was that found?
A. Excuse me.
Q. Where was that found?
A. Well, some was underneath the arm rest, some was in the ashtray and some was in the trunk?
Q. And what else did you find?
A. I found rather large amount of Cocaine and that was in the trunk also.
Q. And how did you get in the trunk?
A. Keys to the vehicle.
Q. And how did you get the keys to the vehicle?
A. Off the Defendant.
Q. You asked him for the keys or did he volunteer them?
A. No, I asked him for the keys.
Q. And did he resist in any way?
A. No, he didn't.
Q. And what exactly did he find in the trunk?
A. Uh, I found a shotgun, a .38 caliber handgun.
A. No. No, he did not.
Q. Isn't it a fact that Mr. Harbert was handcuffed when you took the keys from him?
A. That's true.

Q. And now, do you remember a preliminary hearing in which you testified in front of, uh, was it Judge Fellemth? You testified at a preliminary hearing, isn't that correct?

A. That's right.

Q. And do you remember me asking you the question that you didn't search incident to arrest, but you searched the car pursuant to an inventory search, is that correct?

THE COURT: Is there some foundation for an inconsistent statement? He has made an inconsistent statement that you bring out of prior testimony?

MR SMITH: No, I was just asking him if he remembered the statement, that's all.

THE COURT: Well, why don't you ask him directly?

MR. SMITH: Yes, sir, I will.

Q. And did you search the car pursuant to an inventory search?

A. I had searched the car for an administrative inventory, that's correct.

Q. Okay. Now you, uh, are there any guidelines for the State Highway Patrol on administrative searches?

A. Uh, I'm not sure if there's any set forth in policy and procedure or not.

Q. Excuse me, what was that answer again, please?

A. I'm not sure if there is any set forth in policy and procedure. We're told if we are going to tow a car that we will search the car thoroughly and write down anything that's found in the car.

Q. And what are you, what do you understand as an administrative search, what are the procedures that you are to follow and what are you supposed to do?

A. Well, if I am going to tow a vehicle then I will write down the contents of the vehicle or where

the contents were located at, where they were found at, and secure that vehicle and wait for a tow truck.

Q. Okay. Now, are you given any directions as to where to look and what to look for?

A. Not what to look for, but where to look. We look in the passenger compartment, the rear area, the trunk, the glove box. These are all identified on a 25A card.

Q. And to the best of your recollection there is no policy or procedure for an administrative report search, is that correct?

A. Oh, it's set forth in policy and procedure. I do not know exactly what is set forth and what it states.

Q. Okay. Now policy and procedure, what is policy and procedure? Is that a book or a set of guidelines, I don't understand what that is.

A. It's a set of guidelines that you follow.

Q. Okay. And where are those set of guidelines?

A. Filed at the State Highway Patrol.

Q. Okay. And do you know if you could get a hold of those copies of those policy and procedure guidelines for an administrative search?

A. They are public record.

Q. Okay. And when's the last time that you read them?

A. I really couldn't tell you.

Q. Okay. A year, two years?

A. Maybe four.

Q. Four years ago?

A. Could be.

Q. Okay. And do you know if, what post are you from?

A. 76.

Q. And where is that located?

A. 12621, that's Lincoln Way.

Q. And do you know if request was made at that post whether or not they would have those policy and procedure guidelines?

A. I'm sure that they would.

Q. All right. Are you familiar....

NOTE: MR. SMITH HANDED PAPERS AND A PUBLICATION TO THE COURT REPORTER TO BE MARKED FOR PURPOSES OF IDENTIFICATION AS DEFENDANT EXHIBITS #1, YOU ARE COMMANDED TO SEARCH by Judge James W. Bachman. And there is also the Book YOU ARE COMMANDED TO SEARCH by Judge James W. Bachman, Revised in 1986. Uh, both of them in 1986. Have you ever read those?

A. No, I haven't.

Q. And have you read anything similar to these?

A. I've never seen those before.

Q. And do you know whether a request was made to the Ohio State Patrol Office where you are located and that they said that those were the guidelines that they used? Were they in error?

A. I do not know. I have never seen those items before.

Q. Could you tell me what the guidelines of policy and procedure look like? Does it come in a book?

A. We are searching a vehicle, okay.

Q. Well, let's say, do you have any discussions with officers in command who discuss with you, let's say, uh, on given procedures on who should be towed and searched and who should not. I mean what of the discretion for the patrol officer? Well, let me rephrase that, Your Honor, that was kinda confluted. Do you administratively search all DUI stops?

A. No, I do not.

Q. Okay. And do you make some decision on whether or not to tow or whether or not to search, is that correct?

A. I think that there has been a decision of whether to tow the vehicle and search the vehicle or whether not to tow the vehicle and not to search it.

Q. That's correct. And you made those decisions based on some criteria?
A. Based on that's the officers discretion, whether I want to or whether I don't.
Q. Okay. What I want to know is what goes into that decision making process? What determination is it when you search one car and not another? What do you use as a criteria?
A. I really have no set standards, nothing that I go by. It's a decision I make at the time.
Q. Okay. Then there's no policy or procedure that guides you on that individual decision?
A. Well, you know, it's, uh, it goes without saying that if the vehicle is in the middle of the road and they stop in the middle of the road and there is no berm, uh, you would, uh, I think you would actually tow the vehicle rather than having being there and being a hazard.
Q. And this automobile was in a driveway, is that correct.
A. That's correct.
Q. Okay. And let's just step back from this for a second and describe your, the first time that you see Douglas Harbert, please?
A. When I see him or see his vehicle?
Q. See his vehicle.
A. When he was southbound on Brunnerdale.
Q. Okay, And he was going where?
A. He was on Brunnerdale southbound.
Q. And you were going how fast?
A. 69 and I logged him at 68.
Q. Okay. And you were going north on Brunnerdale?
A. That's correct.
Q. And you were going how fast?
A. I can not recall that now, it's been several months.
Q. Okay. Do you remember what cross street you happened to pass when you saw him?
A. I believe it's Thistlehill or...
Q. Okay. And Thistlehill's right at the top of a hill,

is it not? Brunnerdale's an up and down street, is that correct?

A. No, I wouldn't say that's correct. It all depends on what part of Brunnerdale you're on.

Q. Okay. We're talking about Thistlehill and that area right by where Mr. Harbert turned in. And I think that it's, uh, Heather, Canterbury, Thistlehill and the driveway, would those be the cross streets that we're talking about?

A. I'm not, uh, I haven't been out in that area in a while, but Thistlehill is before where he turned in.

Q. Okay. And do you remember if it was on the top of a hill?

A. I'm not sure if Thistlehill is actually at the top of a hill, uh, or on either side of a hill.

Q. Okay. Anyway, when you passed him he was doing 68 and you were going the opposite direction, is that right?

A. He was going 69 m.p.h.

Q. Okay. For the sake of argument, well, no. You then saw him pull into a private drive and then make a right into a driveway, is that correct?

A. He had made a left into a lane, I believe it was. Idon't believe that is a private drive. It is a gravel lane.

Q. And...

NOTE: MR. SMITH HANDED THREE PHOTOGRAPHS TO THE COURT REPORTER TO BE MARKED FOR PURPOSES OF IDENTIFICATION AS DEFENDANT EXHIBITS #3 AND #4. ALSO #5.

Q. I'm going to hand you what has been marked as Defendant Exhibit #3. Would you take a look at that picture, please, Defendant Exhibit #3. What does that depict.

A. It looks like a road.

Q. And does it have any resemblance to the area that we're talking about?

A. Well, when I stopped him it was about 1:30, 1:40 in the morning.
Q. If this were his driveway and it was looking north, I mean, that private drive or that private road, gravel drive?
A. Oh, are you saying that this here is his driveway?
Q. That's that private driveway.
A. And are you saying that this is Brunnerdale also?
NOTE: PHOTOGRAPH HANDED TO MR. SMITH.
Q. Okay. Now so he pulls into the driveway and he pulls into the driveway and exits his vehicle, is that right?
A. Right.
Q. And he closes the door?
A. I'm not aware of whether he closes the door or not. I can't state for sure.
Q. Okay. And he exits the vehicle and approaches your car?
A. He turns and faces the patrol car, that's correct.
Q. Okay. And the lights are on, is that correct?
A. They were on when I turned.
Q. And the car's in the driveway, right?
A. Are you talking about my red lights?
Q. Yeah, your red lights.
A. Yeah, you're right, they were on.
Q. Okay. So with your lights right behind him, the Prosecutor asked you if he tried to go into the house, but you were right behind him with the red lights on, correct.
A. That's correct.
Q. So he turned and walked towards you, is that correct?
A. He turned and faced me, that's correct.
Q. And you got out of the car and you had a discussion between the two cars, is that correct?
A. Right.
Q. And you indicated that, uh, in one of your reports that he was polite, is that correct?
A. Yeah, he was polite.
Q. Okay. So at that point in time you asked him a

few questions, is that right?
A. Right.
Q. And at that point in time he tells you that he lives there, right?
A. I don't know if it was then or in the car.
Q. Okay. But he tells you that he lives right there.
A. Sometime during the evening he told me that he lived right there.
Q. Okay. Now before he's arrested he tells you that he lives there where the car is parked, is that correct?
A. That's correct.
Q. And it's not on a side street, it's not on an open road, it's in a driveway, correct?
A. His car was in a driveway.
Q. Okay. Alright, so, you then had him sit in the front seat, is that correct?
A. Correct.
Q. And when do you read him his rights.
A. Excuse me.
Q. Do you ever read him his rights?
A. After I had determined that he was impaired and he was going to be going for a breath test.
Q. Okay. Before he's handcuffed or after?
A. I believe it was before he was handcuffed.
Q. Okay. Uh, so anyway, I got ahead of the story. He's sitting in the front seat and you ask him a few questions, is that right?
A. Right.
Q. And one of those questions is you said where do you live and he said, there.
A. I had asked him if that was his current address on his license and he had said no.
Q. And what did he say?
A. He said, no, that he lived here.
Q. Okay. And that's what you wrote down in your police report. Did you go over your police report today, the incident report?
A. The case?
Q. Yeah.

A. Right.
Q. And on your report you put down that he lived at
A. Excuse me. Do you place Mr. Harbert in the back seat? I believe at that time he/s still in the front seat.
Q. Okay. Is he handcuffed?
A. Um-hm.
Q. Do you seat belt him?
A. I believe he's seat belted.
Q. Okay. So he can't move?
A. Uh, I don't believe he could.
Q. Okay. You then exit the vehicle and do you remember searching it with a flashlight, uh, and checking the vehicle in question?
A. Uh, the interior was not locked, so I went and opened the door, that's correct, and I used the flashlight.
Q. Do you remember coming back then to the car and asking Mr. Harbert for his keys then?
A. That's correct.
Q. And then you go up and the first time that you search into the car and look around, you don't find anything right away, right?
A. I'm not sure if I found something right then or if it was later.
Q. Okay. Then you come back to the car and Mr. Harbert is seatbelted and handcuffed, and I assume that he was handcuffed behind his back? Is that correct?
A. Um, that's correct.
Q. And were his keys clipped to the side or were they in a pocket?
A. Uh, I believe that they were in a pocket.
Q. Okay, And so you reached in the pocket and got his keys out and went back into the car and then you started to make out your inventory, conduct your inventory search, is that correct?
A. I believe when I got his keys that's when I went to the trunk.
Q. Okay.

A. And to complete the search.
Q. Allright. And so when you open the trunk, you, uh, excuse me, but do you remember if the car was locked or not?
A. No, I don't believe that it was locked. I went back to get the keys to go into the trunk.
Q. Do you remember testifying in a preliminary hearing where you indicated that you thought that the car was locked?
A. I don't recall that.
Q. You don't recall?
A. It's been several months.
Q. Okay. And do you remember if the trunk was locked?
A. I believe that the trunk would be locked.
Q. Okay. Do you remember, well, I guess I've got it a little confused. There's two times that you go to that car. One, the first time with a flashlight and look around in the windows, allright. Could it be possible that the car's locked and that's why you went back to get the keys?
A. I believe I had the keys for the trunk.
Q. Do you remember going twice to the car?
A. There would be if I went the first time and came back and got the keys and then I'd have to go back up to the car the second time.
Q. So it's possible that the car might've been locked?
A. Uh, the trunk was locked, but the doors, I don't believe were locked.
Q. And you found the Marijuana under the armrest?
A. There was some under the armrest.
Q. Okay. And wasn't in plain view, was it.
A. Uh, I don't believe so. It was just, uh, you lifted up the armrest.
Q. Well, let's start when you open the car. I want you to think back in your memory. You start to open the car and you're gonna do your administrative search. What do you do? Describe for this Court what you do in detail when you open this car for an administrative search?

A. Well, the first thing I look for is just, you know, items that can be taken really.
Q. What do you mean?
A. Like CB radiios, radar detectors, and stuff that can be...
Q. Well what did you see?
A. Well, there was a phone in the car, a cellular phone. I believe there was a dash-mount radar detector. And on the floor there was a scanner.
Q. Did you have a piece of paper and are you marking these things down?
A. These are things that can be taken right away.
Q. Now, in an inventory search it's to protect yourself?
A. That's true.
Q. And the Defendant, right?
A. That's true.
Q. And you're in there to write down what you find and what you see, right, so that you've got some record?
A. That's true.
Q. And you're not writing it down.
A. Not at that time, I was not, no.
Q. Okay. So you're just in there and you see a kind of CB, you said? the second part, say Part B of this administrative search or whatever it was, whenever other officers came, who helped you do this?
A. Uh, there was Trooper Edy, Trooper Hedrick and Sergeant Eastwood.
Q. Okay. Those people did an inventory of that car and not you. You were taking Mr. Harbert downtown, isn't that true?
A. No, the inventory was already done. They were waiting on General Towing, which they were taking a long time to get there.
Q. Okay. How long were you out there?
A. I believe that the stop was like 1:39 in the morning and it could've been an hour.
Q. Okay. So when the other officers came through

you went through and inventoried everything that you found in that car?

A. I believe everything.

Q. Or was it inventoried when you went through with the search warrant?

A. Excuse me.

Q. Or was it inventoried when you went through it with the search warrant?

A. No. I had listed things as we were going through it the first time.

Q. off of that, is that right?

A. Yes, that's correct.

THE COURT: What's that marked?

MR. SMITH: Defendant Exhibit #6, Your Honor.
It's just a rough scale in case other witnesses would be called.

Q. Okay. Now...

MR. SMITH: If the Court will indulge me just three or more minutes.

Q. Just want to ask you, real quick, did you ever ask Doug Harbert if you could search his car?

A. I believe you asked me that before.

THE COURT: Did you or didn't you?

A. No, I didn't.

Q. Do you remember asking Mr. Harbert prior to searching the car whether or not he had anything on him or in the vehicle or in the trunk, any contraband or anything that he shouldn't have had?

A. I believe that's what I had asked him.

Q. Okay. And his answer was?

A. I would be no.

Q. But you asked him that, whether or not he had any drugs in the trunk prior to going into the car? He said no.

A. Even when I was patting him down I asked him if he had anything on him that he should'nt have.

Q. Okay. And...

MR. SMITH: No further questions, Your Honor.

10:04 A.M. - REDIRECT EXAMINATION BY MR. NICODEMO:

Q. Officer, when is it that you initially detected an odor of alcohol, excuse me, not alcohol, but of Marijuana?
A. I couldn't hear the question.
Q. When is it that you initially detect an odor of Marijuana?
A. Talking in between the two vehicles.
Q. Okay. He's outside of the car?
A. When I first approached, right.
Q. And does he indicate to you that he wasn't smoking, but that others were smoking?
A. He stated that he had been in the company of some friends that had...
Q. Did he indicate to you where that was?
A. No, he didn't.
Q. Did he indicate to you that they were smoking in his vehicle?
A. No, he didn't.
Q. And when you found the Marijuana in the car, was it in a joint form or was it in a bag or what?
A. What I found inside the vehicle in the passenger
A. Right. And my back was to the door.
Q. So other officers were now doing the search and you were outside in front of the car?
A. Right. I was searching the hood area of the car.
Q. The hood area of the car for inventory?
A. Well, people put things underneath the hood too at times.
Q. Did you find anything under the hood?
A. No.

MR. SMITH: No further questions, Your Honor.

THE COURT: Thank you, Officer.

Any further witnesses.

MR. NICODEMO: No.

THE COURT: Does the defense want to call

any witnesses?

MR. SMITH: Yes, sir. At this time the Defendant, and only for purposes of this hearing, will call Doug Harbert.

NOTE: THE DEFENDANT APPROACHED THE STAND TO BE SWORN BY THE BALIFF AT 10:09 A.M.

THE BAILIFF: Would you please raise your right hand.

NOTE: THE DEFENDANT RAISED HIS HAND AS REQUESTED FOR THE OATH.

know whether he took a pad and pencil, do you know?

A. I don't recall.

Q. Did he ever give you a copy of a piece of paper at any time about the contents...

A. No.

Q. Let me finish the question. Did he or anybody else ever give you a list of the contents of your car?

A. No, they never did.

Q. Okay. When you left was the car still there?

A. Yes.

Q. Was any officers still there when you left?

A. Yes, there was two or three of 'em.

Q. Okay. When you had originally got out of the car, you had saw the officer's lights, is that why you went to the back of the car?

A. Yes.

Q. Okay.

A. He pulled in behind me.

Q. Okay. And when you were handcuffed you were patted down, is that correct?

A. Yes.

Q. Okay. Was it, let me rephrase that. When you were told to put your hands on the trunk or

I guess, is because...

A. I always lock my car.

Q. How long had you lived at this house?
A. Oh, about two or three months.
Q. And prior to that where did you live?
A. At 1214 Village Avenue, S.E., Canton, Ohio.
Q. And was this a home that you had purchased or were you renting it or...?
A. I'm renting it, yes.
Q. And you lived there that entire time with your girlfriend?
A. Yes.
Q. And does anybody else live there?
A. No, well, her son.
Q. And...
A. Her little boy.
Q. And that car, that is your car, is that correct sir?
A. Which car?
Q. The car that you were in?
A. Well, I wasn't in the car, I was outside. Which car are you talking about? I've got two vehicles.
Q. The car that you were driving that evening?
A. All right, that's my vehicle.